

Takings-Based Limitations on the Power of State and Local Governments to Change Land Use Patterns to Combat Childhood Obesity

KANSAS

This memorandum summarizes Kansas takings law and the manner in which it limits the power of the state and its local political subdivisions to either condemn land to use for anti-obesity initiatives or adopt land use regulations to implement such initiatives. It should be read with our overview memo, which can be found at www.nplan.org/nplan/products/takings_survey. Our goal in this memo is to inform state and local decision makers considering exercising their powers of eminent domain or adopting land use restrictions as part of an effort to combat childhood obesity. The analysis that follows addresses the limitations placed on eminent domain and zoning authority by applicable takings law. It assumes that the governmental entity considering using eminent domain or regulatory zoning authority has been delegated such powers by the state.

This memorandum does not purport to provide legal advice. The analysis we provide is preliminary and not the sort of case-specific, detailed analysis necessary to ensure that a proposed policy will be insulated from takings liability. It does not substitute for consultation with a lawyer, and we urge any political decision maker to confer with an attorney knowledgeable about land use and takings law in Kansas before undertaking a particular policy initiative. If there are important cases, statutes, or analysis that we have omitted from this memorandum, please inform us by sending an email to info@phlpnet.org.

State and local governments are increasingly concerned with the rise in childhood obesity rates among their citizens. In response, they are turning their attention to policies that might combat this alarming trend. Many of these policies involve changing the physical environment in which children spend their days. This physical environment encompasses both public and private spheres. The public sphere includes the network of roads, sidewalks, and recreational paths that make up the community, as well as the various parks, playgrounds, open spaces, public gardens, and lighting that most people think of as public infrastructure. The private sphere includes the various types of development that exist on private property in the community, such as single-family homes, multifamily dwellings, apartment complexes, restaurants, grocery stores, health clubs, and all manner of other private developments.

In many communities, neither the public nor the private physical environment encourages active living and healthy eating. Indeed, the infrastructure in many communities actively discourages or effectively impedes healthy life choices. Too many children grow up in communities that lack parks, playgrounds, and safe, well-lit open spaces to play, have no full-service grocery stores or sit-down healthy restaurants, but are saturated with formula restaurants selling high-calorie, high-fat foods and corner stores selling junk food and sugary drinks. Studies suggest that communities can combat childhood obesity by changing the physical environment in which children live. Positive environment changes would promote active and healthy lifestyles, by

fostering development of infrastructure such as public parks and playgrounds, full-service grocery stores, and well-lit open spaces, and would eliminate the negative influences of the community infrastructure, such as fast-food restaurants and dark, overgrown vacant lots.¹

Communities around the country have already begun to adopt policies and programs designed to change their physical environment, using various strategies and tools. For example, Santa Clara County, California, has adopted a Countywide Trails Master Plan that details the county's commitment to acquiring dedicated easements over private property to create a 500-mile trail system throughout the county to provide recreational and fitness opportunities for its citizens.² Several years ago King County, Washington, adopted a property tax increase to fund the acquisition and maintenance of publicly owned parks and recreation facilities.³ The Los Angeles City Council has imposed a one-year moratorium on the opening of new fast-food restaurants in South Los Angeles.⁴ This zoning ordinance provides a respite during which the city can adopt and implement policies designed to encourage the opening of healthy eating alternatives in the area, which is currently saturated with fast-food restaurants and plagued by high obesity rates. Finally, Naperville, Illinois, has adopted an ordinance requiring developers to include a minimum number of bicycle parking facilities in all new commercial, residential, and public property developments, to encourage biking as an alternative to driving.⁵

Each of these initiatives targets an important aspect of the physical environment, and each involves a different type of government action. The Santa Clara County and King County initiatives require the local governments to acquire property rights in private property—in Santa Clara County the acquisition is by forced dedication⁶ and involves a partial interest in the property, while in King County the acquisition is by eminent domain and involves full title. In

¹ See, e.g., KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT* (2004); L. D. Frank, M. A. Anderson & T. L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87 (2004) (showing that neighborhood walkability was related to obesity in adults); Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309 (2001); P. Gordon-Larsen, M. C. Nelson, P. Page & B. M. Popkin, *Inequality in the Built Environment Underlies Key Health Disparities in Physical Activity and Obesity*, 117 PEDIATRICS 417 (2006) (demonstrating that proximity of recreation facilities is correlated with the risk of overweight and obesity in children); James O. Hill & John C. Peters, *Environmental Contributions to the Obesity Epidemic*, 280 SCI. 1371 (1998); Kate Painter, *The Influence of Street Lighting Improvements on Crime, Fear, and Pedestrian Street Use after Dark*, 35 LANDSCAPE & URB. PLAN. 193 (1996); see also L. V. Moore, A. V. Diez Rous, J. A. Nettleton & D. R. Jacobs, *Associations of the Local Food Environment with Diet Quality: A Comparison of Assessments Based on Surveys and Geographic Information Systems*, 167(8) AM. J. EPIDEMIOLOGY 917 (2008) (ePub) (showing that the availability of supermarkets in neighborhoods was associated with a better-quality diet).

² Santa Clara County Trails Plan Advisory Committee, Santa Clara County Board of Supervisors, Final Countywide Trails Master Plan (Nov. 1995), available at http://www.sccgov.org/SCC/docs%2FParks%20and%20Recreation%2C%20Department%20of%20%28DEP%29%2Fattachments%2F47616ctywide_trails_masterplan.pdf.

³ KING COUNTY, WASH., CODE § 4.08.082 (2009).

⁴ Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 12, 2008, available at <http://www.nytimes.com/2008/08/13/dining/13calo.html>.

⁵ NAPERVILLE, ILL., CITY CODE § 6-9-7 (2009).

⁶ A community can require a landowner to dedicate an easement for public use as a condition of a development permit only when that dedication shares an essential nexus with and is roughly proportionate to the impacts caused by the proposed development. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). This constraint is discussed in detail in www.nplan.org/nplan/products/takings_survey.

contrast, the Los Angeles and Naperville ordinances are two distinct examples of land use restrictions. The Los Angeles ordinance limits what landowners can do with their private property, while the Naperville ordinance imposes an affirmative requirement on private landowners.

These four specific initiatives illustrate the two primary tools available to communities that seek to use land use initiatives to prevent childhood obesity: They can rely on their power of eminent domain, on their land use regulatory authority, or both. The first option—relying on the power of eminent domain to acquire ownership interests in real property—may be used to provide public infrastructure such as parks, playgrounds, and recreational trails to promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit undesirable land uses (such as fast-food restaurants) in vulnerable neighborhoods or to require private property owners to do certain things on their property (such as install bicycle parking structures or stock healthy food in corner stores).

Communities that set out to combat childhood obesity by changing their physical environment using eminent domain or land use regulation will face limitations from both federal and state law in both contexts. The federal limitations come from the Fifth Amendment to the U.S. Constitution, which states: “[N]or shall private property be taken for public use without just compensation.” This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.⁷ Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.⁸ A comprehensive analysis of the scope and extent of these federal constitutional limits can be found at www.nplan.org/nplan/products/takings_survey. In addition to the federal constitutional limitations, every state imposes its own restrictions on the exercise of eminent domain and the imposition of land use regulations by its communities. These limitations, contained in state constitutions as well as statutes, may be more protective of private property than the federal Constitution, and they generally take three forms. First, state laws might incorporate a narrower definition of “public use,” such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Finally, state law may require a community to tolerate certain negative aspects of the physical environment (such as fast-food restaurants) that it would rather eliminate, just because those elements were present before the community undertook its reform initiative—commonly referred to as “grandfathering.”

Communities interested in using land use initiatives to change their physical environment and thereby combat childhood obesity have to be aware of these restrictions on their eminent domain powers and regulatory authority. The purpose of this memo is to explore and explain the particular limitations applicable to communities in Kansas, including constitutional and statutory provisions that limit the eminent domain power or require communities to compensate landowners for validly adopted land use restrictions. Section 1 addresses limitations on the exercise of the power of eminent domain. Section 2 addresses limitations on the imposition of

⁷ See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁸ See, e.g., *Pa. Coal v. Mahon*, 438 U.S. 104 (1978).

land use restrictions through changes in zoning laws. Section 3 explores the scope of the requirement that existing land uses be “grandfathered” under any new zoning regime.

1. Eminent Domain and the Requirement of Public Use

Eminent domain is the forced sale of private land to the public for public use. Ideally, a community that wants to convert private property to a public use negotiates an acceptable purchase price with the current owner of the property, and the sale is entirely voluntary. Occasionally, however, the owner of the parcel does not wish to sell. In these circumstances, many communities have the authority to compel the landowner to sell the property, as long as they pay a fair market price and put the property to public use. The federal Constitution has very little to say about the meaning of the phrase “public use.” In its decision in *Kelo v. City of New London*, the U.S. Supreme Court reaffirmed its past holdings that state and local decision makers enjoy broad discretion to define the concept of “public use,” and upheld the condemnation of private property for transfer to another private party for the purpose of economic development.⁹ States are free, however, to adopt greater protections for private property owners, and many states have done so by limiting the range of projects that count as public use.

The Kansas Constitution requires the payment of just compensation whenever private property is appropriated for public use.¹⁰ This requirement is also codified by statute.¹¹ Following *Kelo*, the Kansas Supreme Court reaffirmed its prior holding that the term “public use” is “broad and inclusive.”¹² In *Young Partners v. Board of Education*, the Kansas Supreme Court held that a school district’s acquisition of a reversionary interest by condemnation satisfied the public use requirement.¹³ The school district owned a defeasible interest in land, and Young Partners owned the future interest. The school district’s interest was conditioned on the continued use of the property for school purposes. The district proposed to condemn the future interest so that the district’s interest would no longer be defeasible. The statute authorizing the condemnation provided that the school district must have made substantial improvements on the property, as well as have held an interest in it for at least twenty years before condemning the reversionary interest.¹⁴ The Kansas Supreme Court held that these two provisions of the statute were enough to create a public interest “by reason of the public’s investment in the property” itself.¹⁵

Although communities in Kansas enjoy broad authority to condemn private property for traditional public uses such as parks, playgrounds, and hike and bike trails, their power to condemn private property for transfer to another private party is quite limited. Effective July 1, 2007, the Kansas legislature adopted amendments to the Eminent Domain Procedures Act that limit the eminent domain authority of state and local governments for purposes of transferring the property to another private entity.¹⁶ The amendments expressly prohibit the taking of private

⁹ *Kelo* is discussed in detail in www.nplan.org/nplan/products/takings_survey.

¹⁰ KAN. CONST. art. 12, § 4.

¹¹ KAN. STAT. ANN. § 26-501a(b) (2009).

¹² *Young Partners v. Bd. of Educ., Unified Sch. Dist. No. 214, Grant County*, 160 P.3d 830, 839 (Kan. 2007).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ KAN. STAT. ANN. § 26-501a(a).

property by eminent domain for the purpose of selling, leasing, or transferring private property to a private entity except in several very narrow circumstances:

1. The taking is by the Kansas Department of Transportation or a municipality, and the property is deemed excess real property, incidental to the acquisition of public improvement project such as a road or park;
2. The property is needed for a public utility;
3. The taking is by a municipality, and the owner has consented in writing to the condemnation;
4. The taking is by a municipality, and the property has defective title;
5. The taking is by a municipality, and the property is unsafe for human occupation; or
6. The condemnation is expressly authorized by the legislature. In this case, if the legislature authorizes eminent domain for private economic development purposes, the legislature shall consider requiring compensation of at least 200 percent of fair market value to property owners.¹⁷

Because these statutory exceptions are so narrowly crafted, there is little room for communities to use eminent domain to transfer property between private parties for the purpose of eliminating unhealthy eating options. However, the statute permits a condemning authority to use eminent domain to take a large tract of land for a traditional public purpose and then lease or sell an “incidental” portion of the acquired tract to a private entity. Under this provision, a community could use eminent domain to create a public park and then transfer a small piece of the park to a concession stand that sold healthy snacks. A condemning authority may also acquire property for redevelopment purposes if that property is considered unsafe for human occupation under the building codes.¹⁸ This is the equivalent to a “blight” condemnation that is permitted in many other states. As long as the property is legitimately unsafe for human occupation, the condemning authority may exercise eminent domain to transfer the property to a private entity. Finally, the statute provides that the state legislature may authorize the condemnation of private property for transfer to a private entity, by enactment of a law that identifies the specific tract or tracts to be taken.¹⁹

Overall, the judicial and statutory climate in Kansas is favorable to communities interested in using eminent domain to further the goal of making their physical environment more conducive to healthy, active lifestyles, to the extent that the policy initiatives entail traditional governmental functions such as parks, playgrounds, and hike and bike trails. But less traditional policy initiatives, in particular those that require the transfer of condemned property to other private owners, will have to fit into one of the narrow exceptions to the prohibition on such condemnations adopted in the wake of *Kelo*.

2. Land Use Regulation and Compensation

¹⁷ *Id.* §§ 26-501a(b), 501b.

¹⁸ *Id.* § 26-501b(e).

¹⁹ *Id.* § 26-501b(f).

Most government initiatives to combat childhood obesity by creating a healthy living environment will rely on zoning powers, not the exercise of eminent domain. For example, the City of Los Angeles has placed a moratorium on the building of new fast-food restaurants in South Los Angeles. Land use regulations such as these rarely implicate takings concerns under the federal Constitution, and governments are generally free to adopt such regulations without incurring federal takings liability.

However, some land use regulations do require compensation. Any land use regulation so severe that it amounts to the functional equivalent of a taking requires payment of just compensation. The U.S. Supreme Court has adopted two bright-line rules and a balancing test to determine whether a land use regulation constitutes a taking under federal law. First, a regulation that imposes a permanent physical occupation on private land is a taking as a matter of law.²⁰ Second, a regulation that deprives a landowner of all economically viable use is a taking as a matter of law.²¹ All other land use regulations—the vast majority of regulations—are evaluated under an ad hoc multifactor test.²² A regulation that does not satisfy one of the bright-line rules will rarely be considered a taking under the U.S. Constitution.²³

Kansas courts follow U.S. Supreme Court precedent and categorize two classes of per se takings: (1) cases of permanent physical occupation and (2) cases in which a regulation denies a landowner all economically viable use of the property.²⁴ In reality, very few land use regulations satisfy these demanding standards for automatic (per se) takings liability. A permanent physical occupation occurs only where there is a compelled physical occupation of property pursuant to governmental coercion that will last indefinitely.²⁵ And regulations have been held to deprive a landowner of all economically viable use of her property only in cases where the landowner was effectively prohibited from making any use of the property.²⁶

Most zoning regulations do not fall into the per se takings categories. Rather, a zoning restriction will prohibit some uses (such as fast-food restaurants) and permit a range of others, and regulations rarely compel landowners to suffer the permanent occupation of their property by strangers. Following the lead of the U.S. Supreme Court, the Kansas Supreme Court analyzes regulatory takings claims under the *Penn Central* factors.²⁷ Application of these factors rarely results in a conclusion that compensation is required.²⁸

As part of the private property rights protection movement of the mid-1990s, Kansas adopted statutory procedural protections for private property owners that compel state agencies to undertake takings analyses before engaging in any government action that may constitute a

²⁰ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

²¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²³ Regulatory takings liability under the U.S. Constitution is discussed in more detail in www.nplan.org/nplan/products/takings_survey.

²⁴ *Garrett v. City of Topeka*, 916 P.2d 21, 30-31 (Kan. 1996) (explaining that Kansas follows the U.S. Supreme Court's Fifth Amendment takings analysis).

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See McPherson Landfill v. Bd. of County Comm'rs of Shawnee County*, 49 P.3d 522, 539 (Kan. 2002).

²⁸ *Id.* (noting that "a regulation does not amount to a taking merely because it significantly diminishes the value of the property").

taking under the state or federal Constitution.²⁹ These protections apply only to state agencies and are purely procedural in nature—that is, they do not impose substantive limitations on the power of eminent domain.

Because the Kansas Supreme Court follows federal precedent in analyzing regulatory takings claims, communities in Kansas that wish to use land use regulations to pursue policies aimed at combating childhood obesity will face no limitations beyond those imposed by the federal Constitution. In general, then, most land use restrictions a community might adopt to combat childhood obesity will impose no takings liability on the community.

3. Grandfathering Prior Nonconforming Uses

The discussion in Section 2 assumes that the zoning restriction imposed on a landowner does not attempt to prohibit the very use to which she is currently putting her property. In some circumstances, a community may wish to prohibit a preexisting use to further its goals of combating childhood obesity. For example, a community may want to eliminate fast-food establishments within a certain distance of schools, including those restaurants that are already operating. Communities in Kansas will not be able to require the immediate cessation of a nonconforming use without paying compensation.

Kansas law protects the right of landowners to continue prior nonconforming uses notwithstanding a zoning ordinance that would outlaw that use.³⁰ However, the right to continue a nonconforming use is not absolute. First, Kansas law permits communities to enact ordinances calling for the gradual elimination of nonconforming uses.³¹ Second, the right to continue a nonconforming use will be lost if the property owner seeks to enlarge or expand his prior nonconforming use.³² In *Union Quarries v. Board of Commissioners of Johnson County*, the Supreme Court of Kansas explained that the use of more modern and effective instrumentalities, as well as the increase in the amount of use within the same nonconforming area, does not amount to an expansion or enlargement of the nonconforming use.³³ The court gave the example that the use of “new, mechanized devices and equipment” in a mining or quarrying operation is simply a more effective way of carrying on the operation. Similarly, it would be unlikely that a nonconforming fast-food restaurant that expanded its menu or increased its hours of operation would be considered to have expanded or enlarged its use. The right to continue a nonconforming use will also be lost if the nonconforming use is abandoned.³⁴ Proof of abandonment requires proof of intent to abandon and an overt act or failure to act, which implies that the owner does not claim or retain any interest in the right to the nonconforming use.³⁵ Although cessation of use may be a factor in determining whether a nonconforming use has been

²⁹ KAN. STAT. ANN. § 77-703 (2009).

³⁰ *Id.* § 12-758 (existing uses protected).

³¹ *Id.* § 12-771 (amortization permitted).

³² *Id.* § 12-758 (attempts to expand or change existing uses not protected); *Crumbaker v. Hunt Midwest Mining*, 69 P.2d 601, 608-10 (Kan. 2003).

³³ *Union Quarries v. Bd. of County Comm’rs of Johnson County*, 478 P.2d 181, 187 (Kan. 1970).

³⁴ *Id.* at 186.

³⁵ *Id.*

abandoned, mere cessation alone does not amount to abandonment.³⁶ Finally, the right to a nonconforming use is strictly construed, and the burden is on the landowner to prove the existence of the prior nonconforming use.³⁷

In general, communities in Kansas interested in changing zoning ordinances to create a physical environment more conducive to healthy, active lifestyles will not be able to require the immediate cessation of nonconforming uses that are inconsistent with their policy initiatives without paying compensation. Rather, they must provide an amortization period or simply wait for the landowner to abandon its right to the prior nonconforming use or expand or alter the use in such a way that he forfeits that right.

³⁶ *Id.* at 186-87.

³⁷ *Crumbaker*, 69 P.3d at 608.